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ABSTRACT

A study analyzed U.S. Supreme Court Justice Lewis Powell's court opinions on First Amendment issues that affect the daily work of journalists. The results showed that he preferred compromises, guidelines, and tests to either/or solutions. Because Powell sought to balance all interests, he developed no firm theoretical position on the First Amendment, nor did he advance freedom of the press. Though his opinions stated that freedom of the press was a societal interest to be protected, he gave the press no greater First Amendment protection than that given the average citizen. Powell's importance to the Burger and Rehnquist courts was due to their fragmentation and his role as middle man, not to his overriding judicial philosophy. (Four pages of endnotes are attached.) (MHC)

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ABSTRACT

JUSTICE POWELL AND THE FIRST AMENDMENT: BALANCING PRESS CONFLICTS

By Rosemarie J. Alexander

U. S. Supreme Court Justice Lewis F. Powell Jr. retired in June 1987, acclaimed by the press as the voice of reason on an otherwise fragmented court; a centrist who balanced constitutional conflicts case-by-case.

This study analyzes Powell's balancing approach to First Amendment issues that affect the daily work of journalists. Because Powell sought to balance all conflicts, he developed no firm theoretical position on the First Amendment, nor did he advance the right to publish. Freedom of the press was a "societal" interest to be protected, he said, but he gave the press itself no greater protection than the average citizen.

Powell was an advocate of creating rules to guide behavior, though he was sometimes unsure which behavior to value most. Powell's "voice of reason" often sounded like the voice of uncertainty.

Powell became important to the Burger and Rehnquist courts because of their fragmentation, not because of his overriding judicial philosophy. In his 15 years on the Court, he remained atheoretical--and may soon be forgotten.

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For A.E.J.M.C. Annual Convention
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July 1988

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Introduction

Court watchers--or at least liberal Court watchers--shuddered when U. S. Supreme Court Justice Lewis F. Powell Jr. retired in June 1987. They feared that President Reagan would tip the Court sharply to the right by appointing a more conservative, rigid Justice. After all, Powell, the "middle man,"¹ was a major reason the Burger Court had not produced a "counter-revolution." Press reporters and editorial writers made Powell sound indispensable; senators seemed to want a Powell clone to replace the 79-year-old Justice.

During his 15-year tenure, Powell had aligned himself with the conservative or liberal wing depending on the case. The press called him the "majority maker,"² for it was often Powell's vote that broke a 4-4 tie. Justice Powell always insisted he lacked a particular judicial philosophy, and from his overall voting record, it seemed he was a centrist. But was he consistently a centrist on First Amendment issues? That question guides this examination of Powell's opinions affecting the press. The answer is a simple "yes": Powell developed no more philosophy about the First Amendment than about any other body of constitutional law.

For this study, Powell's majority opinions, concurrences and dissents were analyzed in cases involving prior restraint,

libel and the press as an institution. The results show he preferred compromises, guidelines and tests to either/or solutions, and essentially used an incremental common-law approach to decision making--balancing "constitutional and societal issues on a case-by-case basis."³ In some instances, his penchant for guidelines confused the issue more than it helped.

In retrospect, Powell hardly seems indispensable and may have assumed a position that was disproportionate to his ideas.

Powell, The Centrist

Powell came to the Supreme Court in 1972 at the age of 64 with no previous judicial experience. He had practiced law for more than 40 years in Richmond, Virginia, and had served as president of the Richmond School Board during the turbulent years of racial integration. In his term as president of the American Bar Association, he gained a national reputation as a political moderate and quiet leader, someone who "would achieve good substance without sacrificing good will."⁴ When President Richard Nixon asked him to accept the nomination to the Court, Powell hedged, saying, "I would rather play than umpire."⁵ Fifteen years later, it seemed Powell had umpired quite well, but if Nixon had hoped for a defender of the conservative faith, he was likely disappointed.

"It is clear from the history of the Court, and certainly that of both the Warren and Burger Courts, that presidents frequently are disappointed in the performance of their appointees," Powell said in a 1986 speech to the American Bar

Association.⁶

In the 1986 term, Powell sided with the majority nearly 90 percent of the time in 147 cases. Forty-one were decided by a 5-4 vote, with Powell in the majority 33 times.⁷ In seven out of 11 free-speech, free-press cases, Powell voted with the majority in favor of free expression over some government intrusion.⁸ A scan of other cases over his 15 years on the Court indicates a conservative bent in criminal law cases, but overall Powell followed no distinguishable ideology.⁹

In First Amendment actions, Justice Powell was more often than not in the majority. Even in cases decided against the news media, he proved to be a more flexible adjudicator than some of his colleagues, often writing a concurrence that explained his vote or noted specific remedies to a press versus government conflict. "I try very hard to reconcile views I may have to help put a court (majority) together," he said in an interview shortly after his retirement.¹⁰

His judicial approach to the First Amendment has often been compared to the late Justice John M. Harlan, who was known for "a sensitive regard for the balance that must ever be achieved in a free society between individual rights and governmental power."¹¹

In remarks about Harlan at an American Law Institute meeting, Powell characterized the jurist's legal perspective as "neither 'liberal' nor 'conservative' as those labels are commonly used....Perhaps the best word to describe Harlan's perspective is 'judicial.'"¹² "Liberal" and "conservative"

labels also do not describe Powell.

In nearly every free press opinion, Justice Powell opted for balance. At times, he criticized a lower court for trampling on the First Amendment rights of the press and in other cases he criticized news reporters for shoddy reporting. He always prescribed remedies to resolve a conflict.

Protecting Society's Interest

By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.¹³

The news media, Powell believed, serve a "societal purpose": providing information, discussion and debate so the American public can make enlightened political decisions. This belief is outlined in a commercial speech case, First National Bank of Boston v. Bellotti. Writing for the Court, Powell said, "The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate."¹⁴

In Bellotti, the Court struck down a Massachusetts statute prohibiting corporations from making contributions to a public referendum campaign, in this case a graduated income tax. The central question was whether the First Amendment protected corporate speech that did not pertain to a corporation's business interests. Powell disposed of the issue quickly. "If the speakers here were not corporations, no one would

suggest that the State could silence their proposed speech.... The inherent worth of speech in terms of its capacity for informing the public does not depend on its source, whether corporation, association, union or individual."¹⁵

But to suggest that the press had a monopoly on the First Amendment would be to contradict "the informational purpose of the First Amendment," he said.¹⁶ While Powell did not address the question of whether media defendants have greater constitutional protection than non-media defendants, he implied they do not.

The Bellotti opinion and Powell's dissent in Saxbe v. Washington Post Co.¹⁷ are good starting points for analyzing Powell's press opinions. Both delineate his method of balancing the First Amendment to protect a political and social process, but show his reluctance to grant news organizations a special constitutional status.

In Saxbe, Powell criticized his colleagues for upholding a Federal Bureau of Prisons' prohibition on personal interviews between news reporters and selected inmates in all federal medium and maximum security prisons. He said the "societal function" of the First Amendment--public discussion of governmental affairs through the press--was at stake. But at the same time, he said the press is not guaranteed First Amendment rights greater than the citizens it serves.

The case was filed against the government by the Washington Post after reporters were denied interviews with specific inmates at two federal prisons. Two lower courts had

ruled that the ban violated the First Amendment and ordered the bureau to consider interview requests on an individual basis. On appeal, the Supreme Court said the ban did not abridge First Amendment rights because reporters were allowed to conduct brief interviews during prison tours, they could correspond with prisoners through the mail, or visit their incarcerated family members and friends--like any citizen.

In his dissent, Powell called the press "an agent of the public" and said a ban on interviews precluded access to information that should be available to the public.

Federal prisons are public institutions. The administration of these institutions, the effectiveness of their rehabilitative programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein are all matters of legitimate societal interest and concern.¹⁸

Saxbe suggests that Powell understood the role of the press and the news gathering process. After reading lower court testimony from three distinguished reporters and journalism educators, Powell likened their job to his own as a practicing attorney:

A newsman depends on interviews in much the same way that a trial attorney relies on cross-examination.... Only in an interview can the reporter pursue a particular line of inquiry to a satisfactory resolution or confront an inmate with discrepancies or apparent inconsistencies in his story...ethical newsmen are reluctant to publish a story without an opportunity through face-to-face discussion to evaluate the veracity and reliability of its source.¹⁹

Powell offered a compromise between a reporter's need to interview certain inmates for a story and prison officials' concern that security could be threatened if those inmates used

their media status to influence other prisoners to engage in disruptive behavior. The bureau, he said, could "enforce reasonable time, place, and manner restrictions" for press interviews, or could refuse to let reporters interview inmates in solitary confinement. Powell recommended that prison administrators retain their authority to suspend all interviews during a prison emergency.²⁰

While such a balance considers the importance of prison security, it also weakens Powell's argument that reporter access should be protected. On the one hand, he said the government would carry a heavy burden for justifying a denial of interviews, and on the other, he would allow a prison warden to select the conditions under which interviews could be conducted, and even designate some of the inmates who would be interviewed.

Refusing the news media complete access was not out of character for Powell. In Saxbe and Bellotti, for instance, he said the institutional press is not privileged to certain information, nor does it enjoy a First Amendment right superior to ordinary citizens. But in Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue,²¹ the associate justice voted to strike down a tax that discriminated against the press. The essence of the opinion was penned by Justice Sandra Day O'Connor: "Differential treatment (of the press), unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression...."²² (Powell did not write an opinion in this

case.) Powell also voted with the majority in FCC v. League of Women Voters,²³ where the Court declared unconstitutional the statutory ban on editorializing by public broadcasters. In both cases, the press as an institution is singled out, making one wonder where Powell really stood on the constitutional status of news organizations.

Journalists and Juries

Confidential News Sources

Powell truly played the centrist in Branzburg v. Hayes, a 4-1-4 case in which Powell swung to the majority, then wrote a concurrence, tempering the result of the majority opinion. His statement has been called the "greatest puzzle" of the case.²⁴

In Branzburg, the Court said the First Amendment does not prevent journalists who wish to protect sources from appearing before a grand jury. But, Powell said, "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."²⁵ A journalist's claim to privilege should be judged on its facts, Powell said, balanced case-by-case between "freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."²⁶

Some commentators say the statement left lower courts wondering how to interpret the decision,²⁷ although many courts translated it into law. Justice Stewart, a dissenter in the

case, would not let Powell off the hook. The Court cannot have it both ways, Stewart said: "While Mr. Justice Powell's enigmatic concurring opinion gives some hope of a more flexible view in the future, the Court in these cases holds that a newsman has no First Amendment right to protect his sources when called before a grand jury." Stewart likened the Court's crabbed view of the First Amendment" to an attempt to annex the press as an investigative arm of the government.²⁸

Confusing as Powell's concurrence may have been, it shows his attempt to find a practical as well as legal solution to a problem. He suggested that a news reporter appear before a grand jury and then decide if the questions violated the reporter's constitutional rights. If the information sought by the grand jury was only remotely connected to the investigation or if the reporter believed the testimony would implicate confidential sources, he or she could ask the court to quash the motion.²⁹ Simply put, the opinion is quintessential Powell, the balancer. Under his rules, no party will always win.

Free Press, Fair Trial

Several famous free-press, fair-trial issues came to the Supreme Court during Powell's fifteen years as an associate justice, including Nebraska Press v. Stuart,³⁰ an appeal from a 1975 mass murder case in the tiny community of Sutherland. The national news spotlight was on the town, where a family of six had been killed by a neighbor, Erwin Charles Simants, who had confessed to the murder. A county judge issued a restraining order to prevent news coverage during Simants'

pretrial hearing, but the order was modified by other state courts. Eventually, publicity was only prohibited on Simants' confession to police and third parties, and on other facts which strongly implicated Simants. By the time the Supreme Court heard the case, Simants had been convicted of six counts of first-degree murder. But the Court unanimously held the original gag order was unconstitutional.

The Court did not say the press should never be restrained from covering a trial, but it imposed a "heavy burden" on lower courts to demonstrate that a fair trial would be impossible without prior restraint.³¹ The majority opinion was accompanied by six concurrences, including one from Powell, who outlined specific rules for balancing a fair trial with a free press.

A trial could be closed to the press, he said, only if (1) news coverage would clearly threaten fairness, (2) the threat was caused by the publicity, (3) no other remedies to ensure a fair trial were available, and (4) previous coverage, or coverage from outside sources, such as national news, would interfere.³²

Nebraska Press is another example of Powell's attempt to remain squarely in the middle of an issue. "The threat to the fairness of the trial is to be evaluated in the context of Sixth Amendment law on impartiality, and any restraint must comply with the...First Amendment," he said.³³

In an earlier in-chambers opinion on a similar case, Times-Picayune Publishing Corp. v. Schulingkamp, Powell noted

a "heavy presumption" against the constitutionality of a court-ordered restraint on pretrial news coverage.³⁴

Times-Picayune involved the rape and murder of a New Orleans student nurse which had prompted critical news stories of a state university program and New Orleans law enforcement. The case is an excellent example of how Powell let the particular facts of a case dictate the legal principles to be applied.

Powell read all the newspaper accounts of the crime, the arrest of two juvenile suspects, and stories about the suspects' background. "Some of the newspaper reporting...can hardly be characterized as responsible journalism," he said. "There appear to be inaccuracies or partial truths in matters that are of obvious importance."³⁵

In Times-Picayune, a Louisiana court had requested the continuation of a stay restricting trial coverage. In granting it, Powell described the importance of balancing the conflict:

If the order is not stayed, the press is subjected to substantial prior restraint with respect to a case of widespread concern in the community. If, on the other hand, the order is stayed and the press fails to act with scrupulous responsibility, the defendants' constitutional right to a fair trial may be seriously endangered.³⁶

The dilemma was fairly representative of the conflict which often occurs between the First Amendment right of the press to cover the courts and the Sixth Amendment right of a fair and speedy trial. Powell's approach was consistent with Branzburg: A reporter's interest could give way to a defendant's right to a fair trial if that right appeared to be

jeopardized by trial publicity.

In Gannett Co. v. DePasquale,³⁷ the justices threw another curve at the news media when they affirmed a New York court's closure of a pretrial hearing. Powell cast the deciding vote in the 5-4 decision, then filed a concurrence, once again modifying his opinion. Whenever a pretrial hearing is closed, he said, the judge must allow the press and public to appeal the decision,³⁸ and should consider alternatives before closing the hearing. Powell sought to protect the "societal interest," then balance it.

I would hold explicitly that petitioner's reporter had an interest protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing...this constitutional protection derives, not from any special status of members of the press as such, but rather because 'in seeking out the news the press...acts as an agent of the public at large.'³⁹

The opinion was consistent with Saxbe and Bellotti, where Powell noted the role of the media, but would not give the media a greater First Amendment privilege.

The next year, in Richmond Newspapers, Inc. v. Virginia,⁴⁰ the Court held that trials are presumptively open to the press under the First Amendment. Although Powell did not participate in the decision, the case is patterned after his "societal interest" principle. In writing for the majority, Chief Justice Warren Burger cited the principle from Bellotti and its application to criminal cases from Powell's opinions in Gannett, Saxbe and Branzburg. Under the First Amendment, Burger said, the press has the protected right to cover trials as "surrogates for the public."⁴¹ Some commentators call

Richmond the beginning of what might be considered a broad constitutional right to gather news,⁴² but the Court did not overrule Gannett until Press Enterprise II,⁴³ a 1986 case filed by a California newspaper seeking access to a pretrial proceeding.

Libel--A Return to Balance

Perhaps Justice Powell's most quoted and most criticized First Amendment opinion is Gertz v. Robert Welch, Inc.⁴⁴ In writing for a 5-4 majority, Powell sought to return libel law to a "balancing test," but he did not balance the competing interests evenly.

Since the famous New York Times v. Sullivan case in 1964, public officials and public figures had to prove "actual malice" or "reckless disregard for the truth" before they could be awarded damages for libel.⁴⁵ In 1971, a year before Powell became an associate justice, the Court applied this test to a case, Rosenbloom v. Metromedia,⁴⁶ which grew out of the arrest of a little-known magazine distributor for possession of "obscene literature." The Court focused on the nature of the story as a public issue rather than the individual involved. Only a plurality voted to extend New York Times to George Rosenbloom, an obviously private person. Three years later, in Gertz, Powell said the application of New York Times to Rosenbloom was unacceptable.

"The eight Justices who participated in Rosenbloom announced their views in five separate opinions, none of which

commanded more than three votes," Powell noted in Gertz.⁴⁷ He devoted seven pages of the opinion to an analysis of Rosenbloom. In formulating new rules for recovering damages for libel, Powell drew from Rosenbloom's dissenters, Justices Harlan, Marshall and Stewart. The centrist Harlan's writings had the most impact.

Harlan had argued that actual malice should not apply to private individuals like George Rosenbloom, because they have not voluntarily placed themselves in the spotlight and cannot rebut damaging statements as easily as public officials. Powell adopted Harlan's sentiments in deciding whether Chicago attorney Elmer Gertz had been defamed by American Opinion, a John Birch Society magazine. He said the New York Times test was too rigorous a standard for private citizens who have not "accepted public offices or assumed an 'influential role in ordering society.'"⁴⁸ Elmer Gertz was a prominent Chicago civil rights attorney, active in civic and professional associations, and the author of several legal articles and books, but under Powell's definition, he was not a public figure. Participation in community affairs did not make a person a public figure "for all aspects of his life," Powell said.⁴⁹ He believed a person's role in the particular controversy should determine whether he or she was a public or private figure.

Powell also adopted Harlan's view on liability. In Rosenbloom, Harlan had said a private person would have to show media fault before recovering damages. "States should be free

to define for themselves the applicable standard of care so long as they do not impose liability without fault," Harlan said.⁵⁰

Powell restated Harlan's standard in Gertz: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual...."⁵¹

In defining this standard, Powell said individuals should not collect actual damages in a libel suit unless they could demonstrate a degree of fault on the part of the media defendant--something beyond publishing or broadcasting an untrue statement. (Punitive damages are unavailable without a showing of actual malice.) A rule of strict liability could lead publishers and broadcasters "to intolerable self-censorship," Powell noted, but the major "societal value" underlying the law of libel was the "compensation of individuals for the harm inflicted on them by defamatory falsehood."⁵² Powell seemed to contradict himself here. By elevating the burden of proof, he had established a fault standard favoring the media defendant. At the same time, he tried to protect private persons by implicitly asserting that reputation is a constitutional interest. Powell was balancing protection of an honest publisher who makes a mistake and a private person who has not "thrust himself in the vortex"⁵³ of a controversy but is defamed by an irresponsible newspaper or broadcaster.

Two years after Gertz, Powell's definition of private

figures was broadened even more. In Time v. Firestone,⁵⁴ prominent Palm Beach socialite Mary Alice Firestone was considered a "private" person despite seeking publicity by holding news conferences during her famous divorce from a Firestone tire heir. Quoting from a Florida circuit court judgment, Time magazine reported that Firestone lost the suit on grounds of "'extreme cruelty and adultery....' The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judges, 'to make Dr. Freud's hair curl.'"55

In her libel suit against Time, Florida courts awarded Firestone \$100,000 in damages. The Supreme Court, however, said that mere wealth would not make someone a public figure, and remanded the case to a Florida court. Firestone was the kind of case Powell had hoped the Gertz decision would limit. To avoid the appearance of a fragmented Court, he voted with the 5-3 majority, then once more qualified his vote in a separate opinion. He said Time reporters had checked the accuracy of the story before publication, but the divorce court's decree was so ambiguous it "could have caused reasonably prudent newsmen to read it as granting divorce on the ground of adultery."⁵⁶

Firestone was an example of punishing a reporter for an innocent error, Powell said, but his own writings in Gertz may have contributed to that. Some critics say that by broadening the definition of a private person, Gertz has "greatly weakened the position of the press."⁵⁷ Hopkins said the "private person

principle" has greatly confused juries charged with awarding punitive damages.⁵⁸ According to Labunski, Gertz "changed libel laws of all 50 states and ushered in an era in which journalists could legitimately claim that they do not know in advance what kind of mistakes would subject them to potentially huge libel judgments."⁵⁹ These views, perhaps overstated, would seem to note the downside of Justice Powell's method of balancing.

In other libel cases, Powell relied on the standards set in Gertz. In Cox Broadcasting v. Cohn, a 1975 invasion of privacy case, Powell noted that Gertz required "truth be recognized as a complete defense."⁶⁰ But he contradicted this statement in Dun & Bradstreet v. Greenmoss Builders, a commercial speech and libel case in which the Court upheld a lower court's award of \$350,000 in damages to a contracting company falsely libeled in a credit report. Writing for the Court, Powell said restrictions on presumed and punitive damages did not apply because the credit report did not concern a matter of interest to the general public. "Speech on matters of purely private concern is of less First Amendment concern," he said.⁶¹

Other First Amendment Tests

Justice Powell wrote few First Amendment majority opinions, but a large number of the most important ones. Gertz and Bellotti, for example, have and will guide the courts until new rules are fashioned. It also is true that Powell rightly

earned the distinction of "middle man" on First Amendment issues just as he did on other constitutional issues. He attempted to balance the conflict between free expression and government restraint as he said he would: "...on the basis of the facts and the law of that case."⁶²

While Powell may have lacked a judicial *philosophy*, it appears his *approach* to decision making derived from the common law model of jurisprudence in which broad principles of fairness rather than absolute and inflexible rules guide decisions. The principles can change depending on the case and are "based on justice, reason, and common sense....These principles are susceptible of adaptation to new conditions, interests, relations, and usages as the progress of society may require."⁶³

Powell's preference for fairness is evident in Saxbe, Branzburg, Nebraska Press, and Gertz, in which he set forth specific guidelines for balancing the competing interests. This method can be seen in other First Amendment decisions, particularly in commercial speech, in which he applied detailed tests. For example, in Central Hudson Gas & Electric v. Public Service Commission of New York⁶⁴ and Consolidated Edison v. Public Service Commission of New York,⁶⁵ Powell devised balancing standards similar to those used in libel.

In Central Hudson, the commission had prohibited promotional advertising by the utility. To determine the constitutionality of the restriction, Powell devised a four-part analysis. He said a court: (1) must decide if the speech

is legal and does not deceive the public, and (2) it must determine if government asserts a substantial interest by restricting the speech. If the first two criteria are met, a court must ask: (3) if the regulation advanced the government interest, and then (4) determine if the regulation was no more restrictive than necessary to serve that interest.⁶⁶ The result was typically Powell: Government can regulate in some situations. While the protection for commercial speech is less than that afforded political speech or the press, Powell's test compares closely with those applied in libel cases--both sides get a bite of the apple.

In Consolidated Edison, the utility had been prohibited by the state from inserting in customers' monthly bills brochures promoting nuclear power. Writing for the Court, Powell cited Bellotti, saying the inherent worth of the speech does not depend on the identity of the source.⁶⁷ Restrictions could be justified: (1) depending on the time, place and manner of the regulation; (2) the content of the speech; and (3) the compelling state interest.

"Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest," Powell said.⁶⁸

The Consolidated Edison opinion is consistent with Gertz, where courts must look at the content of the speech. The compelling interest test can be compared to actual malice in libel cases involving public figures, who must prove the speech

actually harmed them. Here, the state must prove the speech would be harmful to the audience.

Conclusions

Lewis Powell became important to the Burger and Rehnquist courts because of their fragmentation, not because of his overriding judicial philosophy. He continually floated to the center of the Court on First Amendment issues and never established any firm theoretical position on free expression. In those cases, he simply tended to value free expression more than the values asserted by the opposing parties. Analogies can be drawn from other cases, for example, Goss v. Lopez⁶⁹ and Ingraham v. Wright,⁷⁰ in which Powell valued traditional school discipline and authority above other claims. In the celebrated Bakke case,⁷¹ the Justice extolled the role of universities in society and their need to exercise discretionary authority.⁷²

It can be fairly said that Powell was avowedly atheoretical. But that has implications--the most obvious that he probably will soon be forgotten. He has been celebrated as the Court's voice of reason, the middle man building consensus from competing rationales. One look at the cases, however, shows that this is not always true, because Powell often sounded more like the voice of uncertainty.

Aristotle sometimes walked the middle of the road, recognizing that it is not always possible to follow absolute rules. He noted that "there are some cases for which it is

impossible to lay down a law, so that a special ordinance becomes necessary."⁷³ But it is not clear if Powell believed the Aristotelelian position was preferable to a particular ideology--based on the premise that a Justice straddling the center would have a greater chance statistically of making the correct decision. Perhaps Powell played center simply because he did not know where he stood.

The Supreme Court is the "ultimate interpreter of the Constitution"⁷⁴ and final arbiter of conflicting constitutional rights. The Court's role is to define and defend constitutional norms. Tribe argues that those who interpret and enforce the Constitution "simply cannot avoid choosing competing social and political visions."⁷⁵ By not developing a First Amendment ideology, Powell avoided making that choice. In some situations, for example, Saxbe, Bellotti, and Branzburg, Powell took the position that the First Amendment protected the role of the press--then said that protection could be lost under certain circumstances. By trying to have it both ways, he failed to truly advance the value of the First Amendment's "societal function" he so often espoused.

On the other hand, Powell was a strong advocate of creating rules to guide behavior, as can be seen in the tests he prescribed in Central Hudson, Consolidated Edison, and Gertz. While unsure which behavior to value most, Powell nonetheless strongly supported the law's role in directing behavior. For example, in Gertz, Powell attached great value to an individual's reputation, but did not explain, other than by

assertion, why protecting that reputation is sometimes more important than protecting the constitutional right to publish. Also in Gertz, he said ad hoc decisions on libel cases could cause confusion in the lower courts,⁷⁶ so he adopted broad rules. Then he stated that some of those rules would not apply in all future cases.⁷⁷ Because he had not clarified reputation, it would be difficult for lower courts to apply the guidelines.

Powell's effort to balance First Amendment issues may have led to the inconsistency and complexity of some of the principles he adopted. He always maintained that he made a "conscious effort to dissociate himself from his background, so as not to let his reading of the law be skewed by his conservative instincts...."⁷⁸

Justice Powell reasoned that effort this way:

What confidence could a litigant have in a Court that decided cases according to some consistently applied philosophy or 'theme,' rather than on the facts of his case and the applicable law? Each of us has an equal vote, and although we endeavor to harmonize our views to reach a Court judgment, the members of this Court vote independently.⁷⁹

Powell's independence may have restrained conservative refashioning of Warren Court First Amendment decisions. But the liberals who rued his departure were champions of a judge who also did not advance their causes.

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9. Church, p. 10.
10. Applegate, p. 1.
11. Gerald Gunther, "In Search of Judicial Quality on a Changing Court: The Case of Justice Powell," Stanford Law Review 24 (June 1972):1005. See also Paul A. Freund, "Justice Powell--The Meaning of Moderation," Virginia Law Review 68(2) (February 1982):171; and Catherine A. Barnes, Men of the Supreme Court: Profile of the Justices (New York: Facts on File, Inc., 1978), p. 119.
12. Lewis F. Powell Jr., "Justice Harlan," New York Law School Review 31(3)(1986):422.
13. Saxbe v. Washington Post, 417 U.S. 843, 863 (1974).
14. First National Bank of Boston v. Bellotti, 435 U.S. 765, 55 L Ed 2d 707, 721 (1978).
15. Id., at 718.
16. Id., at 721.
17. Saxbe, supra, at 843, 863.

18. Id., at 861.
19. Id., at 853-854.
20. Id., at 873.
21. Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 103 S. Ct. 1365 (1983).
22. Id., at 1367.
23. FCC v. League of Women Voters, 10 Med. L. Rptr. 1937 (1984).
24. Donald M. Gillmor and Jerome A. Barron, Mass Communication Law--Cases and Comment (St. Paul, MN: West Publishing Co., 1984), p. 399.
25. Branzburg, supra, at 665, 709.
26. Id., at 710.
27. Kent R. Middleton and Bill F. Chamberlin, The Law of Public Communication (New York: Longman, Inc., 1988), p. 12.
28. Branzburg, supra, at 725.
29. Id., at 710.
30. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).
31. Id., at 569.
32. Id., at 571.
33. Id., at 571-572.
34. Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301, 1307 (1974).
35. Id., at 1303.
36. Id., at 1305-1306.
37. Gannett Co. v. DePasquale, 443 U.S. 368 (1979).
38. Id., at 401.
39. Id., at 397-398.
40. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
41. Id., at 573.

42. Gillmor and Barron, p. 433. See also Waller v. Georgia, 10 Med. L. Rptr. 1714 (1984). Powell relied on Gannett and Richmond in ruling that closure of a criminal trial involving wire tap evidence is unjustified under the Sixth Amendment. The amendment is "no less protective" of a public trial than the First Amendment is protective of the press and public's right to attend trial, he said.
43. Press-Enterprise v. Riverside County Superior Court, 106 S. Ct. 2735 (1986).
44. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
45. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
46. Rosenbloom v. Metromedia, Inc., 91 S. Ct. 1811 (1971).
47. Gertz, supra, at 333.
48. Gertz, supra, at 345. Citing Curtis Publishing Co. v. Butts, 388 U.S. at 164.
49. Id., at 352.
50. Rosenbloom, supra, at 1830.
51. Gertz, supra, at 347.
52. Id., at 341.
53. Id., at 352.
54. Time Inc. v. Firestone, 424 U.S. 448 (1976).
55. Id., at 452.
56. Id., at 469.
57. Emerson, p. 5.
58. See W. Wat Hopkins, "Negligence 10 Years After Gertz v. Welch," Journalism Monographs 93 (August 1985):1-30, passim.
59. Richard Labunski, Libel and the First Amendment (New Brunswick, N.J.: Transaction Inc., 1987), p. 148.
60. Cox Broadcasting Corp. v. Cohn, 1 Med. L. Rptr. 1829 (1975).
61. Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 195 S. Ct. 2939 (1985).
62. Church, p. 10.

63. Steven H. Gifis, Law Dictionary (Woodbury, N.Y.: Barron's Educational Series, Inc., 1984), p. 81.
64. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 65 L Ed 2d 341 (1980).
65. Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530 (1980).
66. Central Hudson, supra, at 351.
67. Consolidated Edison, supra, at 530.
68. Id., at 540.
69. Goss v. Lopez, 419 U.S. 565 (1975).
70. Ingraham et al. v. Wright et al., 430 U.S. 651 (1977).
71. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
72. Todd F. Simon, "Of Colleges and Kings: Academic Defendants Under 42 U.S.C. §1983," St. John's Law Review 59(2) (Winter 1985):228-290.
73. For a discussion of Aristotelian law, see Edgar Bodenheimer, Jurisprudence: The Philosophy and Method of the Law (Cambridge, Mass.: Harvard University Press, 1981), p. 72, passim.
74. Powell v. McCormack, 395 U.S. 486, 549 (1969).
75. Laurence H. Tribe, God Save This Honorable Court (New York: Random House, Inc., 1985), p. ix.
76. Gertz, supra, at 343.
77. Id., at 344.
78. Stuart Taylor Jr., "Powell on His Approach: Doing Justice Case by Case," Chicago Daily Law Bulletin, 14 July 1987, p. 2.
79. Lewis Powell, "What Really Goes on at the Supreme Court," ABA Journal 66 (June 1980):723.